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NATURAL RESOURCES
DIVISION

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

RICHARD BROLICK,
ROBERT GEZON AND
TERA JACKSON,

Petitioners,

vs.

Case No. 99-39141-AA

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,

OPINION

Respondent.

WILLIAM C. FULKERSON (P13758)
JAMES M. ROSE (P26592)
Co-Counsel for Petitioners

BARBARA A. SCHMIDT (P40530)
Assistant Attorney General
on behalf of Respondent

At a session of said Court held in the County
Building, in the city of Muskegon, county and
state aforesaid on the 4th day of October, 1999.

PRESENT: HONORABLE WILLIAM C. MARIETTI
Circuit Judge

Petitioner applied with the Respondent, DEQ, for a special exception pursuant to MCL 324.35317. DEQ forwarded the request to White River Township where the property was located. The Township objected to the application. The DEQ took the position that the Township's objection foreclosed any further action and denied the request. The Petitioner requested a contested case hearing. In an opinion on a

motion to determine the scope of such a hearing, the administrative law judge dismissed the request in a ruling that found the DEQ acted in accordance with the mandate of MCL 327.35317(3).

Initially, the Respondent challenged subject matter jurisdiction in this court because there never was a contested case hearing conducted pursuant to the APA. The Petitioner, if dissatisfied with the denial, was required to request a hearing on the DEQ's adverse decision. MCL 324.35305(1). The Petitioner, in fact, did make such a request. The administrative law judge dismissed the petition for a contested case hearing and designated it a final agency decision. Petitioner's brief, Exhibit A. The effect of the dismissal was to leave in place the DEQ's action in not issuing the special exception that Petitioner had requested. A departmental decision in regard to a denial of a special exception is subject to judicial review in the Circuit Court. MCL 324.35305(2). There was a hearing which was limited to a consideration of the fact question of whether the Township objected to the special exception and the legal question of the effect of the Township's objection to the special exception. In fact, the administrative law judge, quite appropriately, deferred the issue of the constitutionality of the statute to a judicial forum. Exhibit A, *Supra*. The scope of the review allowed by MCL 324.35305(2) is set forth in MCL 24.306 and this includes a consideration of constitutional issues and procedure. This court has subject matter jurisdiction over the agency decision to dismiss the request for a contested hearing based upon the administrative law judge's interpretation of MCL 324.35317(3).

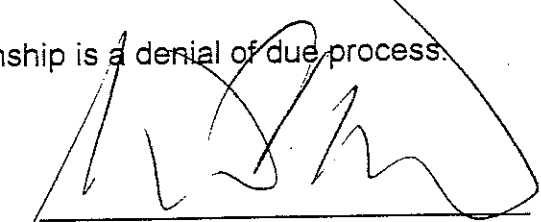
The court agrees with Respondent's position that Robert Gezon and Tera Jackson are not proper parties to this proceeding. They did not apply for the special exception nor did they request a hearing before the administrative law judge. Accordingly, they are dismissed from the review proceeding.

The court also agrees that the Petitioner cannot, for the first time in this review proceeding, raise the issue of the DEQ's untimely forwarding of his application to the township. That is an issue that should be presented to the administrative law judge whose decision is subject to review by this court. Moreover, assuming this issue was properly before the court, the Petitioner has not presented any facts to establish prejudice beyond the mere statement that he was prejudiced.

After reviewing the record, the briefs, and receiving oral argument, the court is convinced that the statute, as interpreted by the administrative law judge for the DEQ, is unconstitutional because it fails to provide standards to guide the DEQ which is charged with its administration. See, *Osuis v. St. Clair Shores*, 344 Mich 693 (1956). The DEQ has interpreted the statute involved to require its denial of a special exception if the local Township opposes it. Petitioner's brief, Exhibit A. This court finds that the administrative law judge correctly interpreted the statute.

MCL 324.35317(3) grants the Township an unfettered opportunity to veto the special exception in this case. It is analogous to a peremptory challenge of a juror. No reason need be given. There is nothing to review in an administrative hearing or this court. Government cannot regulate the use of private property in an arbitrary or capricious manner. *Osuis, supra*. Without statutory standards against which the

Township's conduct can be measured, a reviewing body cannot determine whether the conduct of objecting to the special exception was arbitrary. The lack of any standards against which to measure the decision of the township is a denial of due process.



Hon. William C. Marietti